EVIDENCE – Rule 404(b), Ariz. R. Evid. – "Other crimes, wrongs, or acts" – "Clear and Convincing" requirement – Revised 3/2010

Rule 404(b) provides an exception to the general rule that "other acts" evidence is inadmissible. Rule 404(b) allows other acts to be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." "This list of permissible purposes is merely illustrative, not exclusive." *State v. Wood,* 180 Ariz. 53, 62, 881 P.2d 1158, 1167 (1994). In *Wood*, the court noted that other acts evidence could, for example, prove *lack* of premeditation.

Although the Arizona Rules of Evidence are similar to the Federal Rules of Evidence, Arizona has a stricter standard than the United States Supreme Court for the admission of other acts evidence. The federal rule is that "other acts" evidence may be admitted as long as the trial court finds that sufficient evidence of the other act has been established so that a reasonable trier of fact could find by a preponderance of the evidence that the other act occurred. *Huddleston v. United States*, 485 U.S. 681**,** 686-687 (1988). But in Arizona, the other acts evidence may not be admitted unless there is "clear and convincing evidence" that the other act was committed and that the defendant committed the act.

In *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997), the court stated that although Arizona adopted the Federal Rules of Evidence in 1977, it is not bound by the high Court's "non-constitutional construction of the Federal Rules of Evidence when we construe the Arizona Rules of Evidence," *quoting State v. Bible*, 175 Ariz. 549, 580, 858 P.2d 1152, 1183 (1993). The court held that it was not adopting the preponderance standard of *Huddleston* but the standard of *State v. Hughes*, 102 Ariz. 118, 426 P.2d 386 (1967), which held that before other acts evidence may be admitted,

it must be proven by *clear and convincing evidence* that the other acts were committed and that the defendant committed them. *Terrazas*, *id.*

The court in *Hughes* stated that the proof as to the commission of the other crime and its commission by the defendant must be by substantial evidence -- that is, evidence sufficient to take the case to the jury. *Hughes*, 102 Ariz. at 123, 426 P.2d at 391. The *Terrazas* court's reasoning for adopting the *Hughes* standard was that the other act evidence may influence the jury's decision improperly, despite limiting instructions from the judge:

Because of the high probability of prejudice from the admission of prior bad acts, the court must ensure that the evidence against the defendant directly establishes "that the defendant took part in the collateral act, and to shield the accused from prejudicial evidence based upon highly circumstantial inferences." Applying the standard of "clear and convincing evidence" establishes a "clear, recognizable standard for courts and lawyers and is consistent with the due process owed under the federal and state constitutions." To allow a lesser standard in a criminal case is to open too large a possibility of prejudice. . . . Therefore, before admitting evidence of prior bad acts, trial judges must find that there is clear and convincing proof both as to the commission of the other bad act and that the defendant committed the act. *Terrazas*, 189 Ariz. at 584, 944 P.2d at 1198 [emphasis added; citations, footnote, and internal quotations omitted.]. Therefore, in Arizona, a stricter standard is necessary for admissibility of "other acts" evidence than in federal courts. The court still accepted the four safeguards listed by the Supreme Court in *Huddleston* as protecting against unfair prejudice:

> (1) rule 404(b)'s requirement that the evidence be admitted for a proper purpose;
> (2) the relevancy requirement of rule 402;
> (3) the trial court's assessment that the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice, *see* rule 403; and
> (4) rule 105's provision for an appropriate limiting instruction, if the party requests one.

Terrazas, 189 Ariz. at 583, 944 P.2d at 1197, *citing State v. Atwood,* 171 Ariz. 576, 638, 832 P.2d 593, 655 (1992), *disapproved of on other grounds by State v. Nordstrom,* 200 Ariz. 229, 25 P.3d 717 (2001).